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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 606.

NATIONAL SURETY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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Authorities Cited.

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The brief in support of the petition for a writ, in compliance with the rules, confined itself to a seven-page direct and concise discussion of the reasons why a writ should be granted to bring the case before the Court for considered action on the questions involved. It did not attempt a full discussion of the merits. This seems to conform to the accepted practice of this Court. *C. B. Kennemer et al.* v. *C. B. Billington*, decided October 9, 1944.

The answering brief, served and filed out of time, implicitly admits the conflict of decisions in the Courts below as outlined in the petition and does not deny the importance of the questions involved. Rather its seventeen pages are devoted largely to a discussion of the merits of the case as though the petition had already been granted. If the Court should deny the petition on the basis of the government's brief, the petitioner would be deprived of an oppor-

tunity to present its case on the merits, since it is believed inappropriate to offer a full presentation of the case at this stage, even if time permitted.

A Review of the Government's Brief.

As we view the government's brief, it amounts to a tacit admission that adequate grounds exist for the issuance of a writ and that the Court below erred in its primary proposition that defenses of the principal were not open to the surety. This seems evident because the brief is principally devoted to a discussion of the very defenses that the Court below held were precluded. Such a discussion appears premature at this time, but having been presented, it seems necessary to point out, briefly, some of the errors inherent in it.

The notice to detain the seaman Pauruga was issued only five days after the promulgation of Executive Order 8429. He was at sea at the time the Executive Order was issued on January 5, 1940 and had no opportunity to obtain a passport, R. 41, 42. This probably is the first case that arose after the issuance of Executive Order 8429. Since that time several hundred cases have arisen on notices to detain based solely on that Executive Order or regulations of similar nature, in many instances under circumstances that resulted in sit-down strikes or mass desertions by violence for which large fines are claimed, sometimes amounting to as much as $15,000 on a single arrival. The case therefore is one of serious importance.

The question of the effect of Executive Order 8429 is one of first instance, except as it has been inferentially decided contrary to the view of the Court below in the case of *Johnson* v. *Keating*, 17 F. (2d) 50 (C. C. A. 1) and the opinion of Attorney General Jackson, 39 Op. 509, 515, 516.

On the merits, we have the question of whether Executive Order 8429, founded explicitly on the wartime Act of May 22, 1918, which had its own provisions for enforcement, as supplemented by the Act of March 2, 1921, which did not carry the penal provisions forward, can or should be enforced by the penalty provided by Section 20 (a) of the Immigration Act of 1924.

The government recognizes that the Act of May 22, 1918 was not in effect at the time Executive Order 8429 was issued, because the United States was not then at war. A provision in the Appropriation Act of March 2, 1921 had kept in effect the passport and visa requirements for aliens which had been provided under the 1918 Act, until otherwise provided by law. It did not empower anyone to prescribe further regulations. The penalties of the 1918 Act were not preserved. *Flora* v. *Rustad* (C. C. A. 8), 8 F. (2d) 335, *United States* v. *One Airplane, etc.*, 23 F. (2d) 500.

The government also concedes (Brief, p. 8) that the 1921 Act was superseded by the Immigration Act of 1924 in so far as it related to documentary requirements for immigrants, but it makes the illusory contention that this was not so with respect of alien seamen because they are now classified as non-immigrants. The short answer to this is that no classification of aliens as immigrants and non-immigrants was ever made until 1924. The 1921 Act did nothing more than to preserve the documentary requirements for aliens as they then existed. No law or regulation at that time required passports for bona fide alien seamen. On the contrary they were expressly excluded from passport requirements by the joint order of the Secretary of State and the Secretary of Labor issued July 26, 1917. See Immigration and Nationality Laws and Regulations as of March 1, 1944, pages 204, 206. Since the government

concedes that no authority can be found for Executive Order 8429 in the Immigration Act of 1924, how can it logically contend that the authority exists in the 1921 Act, which also did not provide for passports or authorize any change in the then existing requirements?

The fact that the Executive Order did not have any statutory foundation as was recognized by the Congress by the Act of June 21, 1941, amending the Act of May 22, 1918 to make it applicable in times of national emergency not limited to war. Public Law 114, 55 Stat. 252. That was more than a year after the Executive Order was issued.

Taking a different line of argument, the Government admits that no foundation can be found in the Immigration Act of 1924 for the promulgation of Executive Order 8429. It further contends that there are no provisions in the Immigration Act of 1924 under which the immigration service could issue regulations of the nature provided in Executive Order 8429. From that premise it proceeds to the proposition that an executive order may be invoked to supply the supposed deficiency and be enforced through the sanctions of the very Act that it says does not grant power for the issuance of such a regulation. It even points out, page 11, that the immigration service has promulgated further regulations based on the Executive Order, rather than on any provision of law, thus building up a system of immigration regulations that the government itself states are beyond any authority granted by the immigration laws.

If this proposition is correct, as it may be because, as hereafter pointed out, the Congress in passing the 1924 Immigration Act rejected a provision requiring passports for alien seamen, it follows by necessary corollary that such regulations cannot be enforced through the penalties provided by the immigration laws.

The difficulty with the Government's position in this aspect is that it reads itself out of the basic immigration laws and pins its faith on a wartime act that was not in force at the time Executive Order 8429 was issued, the penal provisions of which were eliminated by the Act of March 2, 1921, and then seeks to enforce the Executive Order by resort to penalties provided by Section 20(a) of the Immigration Act of 1924, which it says contains no provision for the issuance of such regulations.

In an attempt to buttress this astonishing proposition, it refers to Section 25 of the Immigration Act of 1924, brief page 13. Lines 5, 6, 7 and 8 of that section as quoted in the brief provide for a complete destruction of the argument for, under that section, if Executive Order 8429 and the Acts on which it is based come within the category of other immigration laws, they are to be enforced pursuant to their own provisions, not by the penalties provided by the Immigration Act of 1924.

It will be shown on full presentation of the case that when the Immigration Act of 1924 was up for consideration before the Congress, a proposal that alien seamen should be required to have documents in the nature of passports, as a condition of shore leave was considered and rejected. Consequently, it cannot be lightly concluded that when Section 20(a) of that Act was adopted, it was the intention of the Congress that the penalties therein provided could be invoked for the enforcement of a regulation requiring passports for alien seamen.

As pointed out in our brief in support of the petition, there is nothing in Executive Order 8429 to indicate that it contemplated enforcement through the immigration laws. The Act on which it was based contained certain penal provisions, none of which would have been applicable to the

circumstances here involved, and even those penal provisions were not in force after the passage of the Act of March 2, 1921. *Flora* v. *Rustad,* 8 F. (2d) 335; *United States* v. *One Airplane &c.,* 23 F. (2d) 500.

The Executive Order, if it has any effect, is nothing more than a directive for the guidance of the enforcement section of the immigration service. The penalty of deportation is available against aliens who are found unlawfully in the United States, but there is nothing in the immigration laws that warrants the imposition of fines against carriers in the circumstances of this case.

Furthermore, it is inconsistent with the established attitude of the Government towards its allies, as exemplified by such examples as the Lend Lease policy, to suppose that the President, in issuing Executive Order 8429, should have intended that it would be enforced against shipowners of our allies by placing on them the burden of imprisoning large numbers, sometimes an entire crew of bona fide seamen, and imposing heavy fines on account of those who might succeed in escaping, simply because the seamen, usually because of ignorance or other excusable reasons had not provided themselves with passports. Indeed, it is rather surprising that the Department of Justice should want to commit the Government to such a position.

Much time and ingenuity have been expended in attempting to support Executive Order 8429 as a basis for the imposition of fines under section 20 (a) of the Immigration Act of 1924.

The Board of Immigration Appeals wrote two separate opinions on the subject. It first decided that the 1924 Act did not supersede the previous Acts in so far as non-immigrants were concerned. When shown that there was no such thing as a non-immigrant until 1924 it withdrew

from that position and upheld the Executive Order simply by stating, "We accept without question the validity of this order. Other orders issued under the same authority have been upheld as valid." M. V. Darima and other cases, No. 56096/807-861-803-251; 56118/13. The District Court in this case did not follow either theory advanced by the Board of Immigration Appeals, but adopted a theory of its own which did not find favor with the Circuit Court of Appeals. The present brief of the government, without relying on reasoning advanced by either of the courts below, falls back on the abandoned theory of the Board of Immigration Appeals and an entirely new theory of its own. In view of this history it can hardly be said that the question has been put at rest.

With respect to the power of a boarding inspector to issue a valid order to detain, little further need be said at this time. The brief in support of the petition summarily points to the questions involved.

The government's brief says that our position on this question is predicated on a wholly unrealistic approach, on the theory that the immigration officer in charge could not personally perform such functions in addition to his other duties when several ships might be docked in the same port. Such a suggestion was made by Judge Manton in *Lloyd Royal Belge etc.* v. *Elting*, 61 F. (2d) 745. But it overlooks the fact that the immigration officer in charge in such matters, does not act personally, but acts through Boards of Special Inquiry (Sec. 17, Immigration Act of 1917, 8 U. S. C. 153) and is therefore equipped to and does deal with very large numbers of aliens, including passengers, without difficulty. In practice, these boards have always passed on the eligibility of all aliens, immigrant and non-immigrant except seamen. No practical difficulty is involved, and this was

recognized by the Court of Claims in *Rio Cape Line, Ltd.*, v. *United States*, 89 Ct. Cls. 307, 316 and 317 in the face of two or three decisions to the contrary.

CONCLUSION.

It is submitted therefore that the petition for a writ of certiorari should be granted as prayed.

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